duties lawfully.[21] Had the statute provided that the board of canvassers should have any judicial or discretionary powers then mandamus could not have been issued;[22] but no more could an injunction.[23] For is must be inferred that the legislature, by providing for no appeal from their decision, intended that their findings should be conclusive;[24] and any judicial interference with the determination would be a violation of the doctrine of separation of powers.[25] It seems, therefore, that the writ of mandamus[26] furnishes an adequate and permanent remedy and that the jurisdiction of equity in the circumstances of the principal case, should have been limited to the issuing of a preliminary injunction to prevent irreparable injury pending the outcome of mandamus proceedings.

DOUBLE JEOPARDY IN AN ACTION FOR A PENALTY.—The tendency of modern legislation to supplement the punishment of fine and imprisonment provided for a misdemeanor with that of a penalty or a forfeiture, recoverable in a separate action at the suit of the state, has provoked a corresponding effort to nullify such additional punishment by declaring the suit for its recovery to fall within the rule against double jeopardy. Evidently, this defense is based upon the theory that the immunity from double jeopardy is applicable to property rights, because an action to declare a forfeiture is strictly an action *in rem,* and the failure to satisfy a judgment for a penalty does not involve imprisonment,[1] as in the case of non-payment of a fine.[2] This view, however, finds little support in the considerations surrounding the origin of the maxim, *Nemo debet bis puniri pro uno delicto.* This ancient immunity was established at a time when punishments were corporal, rather than pecuniary,[3] and were extremely severe.[4] Conviction for a felony was always attended by the forfeiture of the convict's lands

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[21]It seems that mandamus will lie not only to compel an officer to perform his duty but also to show him what is his duty. High, Extraordinary Legal Remedies (3rd ed.) §56a. See State *ex rel.* Metcalf *v.* Garesche (1877) 65 Mo. 480; Gleason *v.* Blanc (N. Y. 1895) 14 Misc. 620; State *ex rel. v.* Commrs. (1886) 35 Kan. 640.

[22]Halloran *v.* Carter (1891) 13 N. Y. Supp. 214.

[23]Weil *v.* Calhoun (1885) 25 Fed. 865; Sanders *v.* Metcalf (1873) 1 Tenn. Ch. 419; Mendenhall *v.* Denhan (1895) 35 Fla. 250.

[24]See Skrine *v.* Jackson (1884) 73 Ga. 377; Atty. Genl. *v.* Supervisors (1876) 33 Mich. 289.

[25]Harrell *v.* Lynch, *supra;* see Lumber Co. *v.* Harrison County (1906) 89 Miss. 171.

[26]The relator in mandamus proceedings need not show that he has any legal or special interest in the result, it is sufficient to prove that he is a citizen. High, Extraordinary Legal Remedies (3rd ed.) § 431; see note to case of Brewster *v.* Sherman (Mass. 1907) 11 Ann. Cas. 419.

[1]*In re* Sorenson (1874) 29 Mich. 475; *In re* Hanson (1853) 36 Me. 425.

[2]*Ex parte* Karlson (1911) 160 Cal. 378.

[3]2 Pollock & Maitland, History of English Law (2nd ed.) 452-3.

[4]The phrases "jeopardy of life or limb" and "jeopardy of life or liberty" common to several State constitutions, Const. Penn. Art. 1, § 10; Const. Mo., Art. 2, § 23, seem to indicate that the prohibition was directed against repeated interferences with the person of the defendant.

to his overlord, and of his goods and chattels to the sovereign.[5] It seems that such forfeitures were never questioned as violative of the principle of double jeopardy, nor does it appear that this defense was ever interposed in the suit by the Crown to recover personal property forfeited by the conviction.[6] The fact that the judgment of forfeiture universally accompanied the corporal punishments for felony seems to justify the conclusion that this salutary principle of the common law had no reference to the jeopardizing of the property, but only of the person, of the accused.

Apparently this distinction has been lost sight of in some modern decisions, for the defense of double jeopardy has been sometimes allowed in actions of a strictly civil nature. No more marked instance of this practice can be found than in the decisions of those courts which refuse to award exemplary damages in an action for a tort which is also punishable as a crime,[7] on the ground that such damages are aimed at the public, and not the private, wrong.[8] Similar reasoning has led some courts to conclude, as heretofore suggested, that the principle of double jeopardy prohibits the maintenance of suits by the state to recover statutory penalties and enforce forfeitures incident to violations of statutes, when the defendant has been prosecuted under an indictment for the same offense. In support of this view it is said that although the penalty is recovered, or the forfeiture enforced by action and not by indictment, yet in spirit and effect the suit partakes more of a criminal than of a civil nature.[9] Hence, it has been held that a previous acquittal for the violation of a revenue law will bar an action of forfeiture to complete the punishment denounced by the statute,[10] and that in such a proceeding the defendant cannot be compelled to testify against himself.[11]

Although the federal courts have regarded such proceedings by the government as quasi-criminal actions, to which some of the privileges and immunities usually accorded the accused in criminal prosecutions are attached, and others denied,[12] most of the state courts have taken

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[5] 4 Bacon's Abr. (Am. ed.) 338 *et seq.*

[6] See *In re* Bateman's Trust (1873) L. R. 15 Eq. 355; *cf. In re* Thompson's Trusts (1856) 22 Beav. 506.

[7] Koerner *v.* Oberly (1877) 56 Ind. 284; Fay *v.* Parker (1872) 53 N. H. 342, 385 *et seq;* see Murphy *v.* Hobbs (1884) 7 Colo. 541.

[8] By the weight of authority, however, such damages are allowed, and their imposition is defended on the ground that they are assessed to compensate for the vindictive manner in which the injury is inflicted. Chiles *v.* Drake (Ky. 1859) 2 Metc. 146; Baldwin *v.* Fries (1891) 46 Mo. App. 288.

[9] United States *v.* McKee (1877) 4 Dill. 128; Coffey *v.* United States (1886) 116 U. S. 436. It was held in United States *v.* Chouteau (1880) 102 U. S. 603, that a suit on a penal bond is barred by a compromise of the prosecution of the principal. A similar result is reached in United States *v.* Ulrici (1880) 102 U. S. 612.

[10] Coffey *v.* United States, *supra.*

[11] Boyd *v.* United States (1886) 161 U. S. 616, 634.

[12] Thus the Supreme Court has held, in a suit to enforce a forfeiture, that the government may offer testimony of a non-resident witness by disposition, United States *v.* Zucker (1896) 161 U. S. 475, and that in a suit to recover a penalty, the trial court may direct a verdict for the government. Hepner *v.* United States (1909) 213 U. S. 103, 27 L. R. A. [N. S.] 739, 16 Ann. Cas. 960.

the position that these are purely civil actions.[13] Hence, in the latter jurisdictions it is said that the difference in the forms of procedure and the degree of proof required, prevent the criminal prosecution from barring the civil action.[14] But this argument seems doubtful when applied to the case of a prior conviction.[15] And though the result reached by this line of cases is correct, the true basis of double jeopardy depends not upon the form of the penal action, but upon the consideration of whether by the second suit the defendant's life or liberty, as distinguished from his property, is imperilled. This was the *ratio decidendi* of the recent case of *Stout* v. *State ex rel. Caldwell* (Okla. 1913) 130 Pac. 553. The court held that a suit to recover a penalty for an act which was also made a misdemeanor, punishable by fine and imprisonment, did not violate the constitutional prohibition of double jeopardy, since only the defendant's property interests were at stake. This principle is recognized in a number of jurisdictions in a line of analogous cases which hold that a verdict for the defendant in a criminal prosecution may be reversed when the punishment is merely pecuniary,[16] or is not infamous.[17] Likewise, statutes permitting the abatement of nuisances for the maintenance of which indictments will lie, have been held constitutional in several instances.[18] And in accord with this doctrine it is recognized that the imposition of a fine for the disregard of a mandamus order does not bar a subsequent prosecution for the defendant's misconduct.[19] It seems, therefore, that the tendency of some courts to extend the principle of double jeopardy to suits for the recovery of penalties is the result of a failure to recognize the logical limits of a doctrine intended as a protection of the person of the accused.

TITLE TO THE BEDS OF NAVIGABLE STREAMS.—The common law tendency to assign to the king all lands that had no determinable owner very early led the courts to place in the King the title to the bed of the sea,[1] and to all arms of the sea or rivers in which the tide ebbed and flowed.[2] Above tidewater, however, even where the river

[13]Grenada Lumber Co. *v.* State (1910) 98 Miss. 536; State *v.* West Plains Tel. Co. (1911) 232 Mo. 579.

[14]Adams *v.* Sigman (1906) 89 Miss. 844; People *v.* Snyder (N. Y. 1904) 90 App. Div. 422.

[15]But by some courts this general rule of *res judicata* has been held to have no application where the civil suit is brought to recover a part of the punishment denounced by the statute. United States *v.* Jaedicke (1896) 73 Fed. 100; but see State *v.* Meek (1910) 112 Ia. 338. This case supports Coffey *v.* United States, *supra.*

[16]Jones *v.* State (1854) 15 Ark. 261; see State *v.* Spear (1840) 6 Mo. 644, where it is held that the decision must be otherwise if the penalty is one which affects the life or liberty of the accused.

[17]Commonwealth *v.* Prall (1912), 146 Ky. 109.

[18]Micks *v.* Mason (1906) 145 Mich. 212, 11 L. R. A. [N. S.] 653; State *v.* Roach (1910) 83 Kan. 606, 31 L. R. A. [N. S.] 670, 21 Ann. Cas. 1182.

[19]People *v.* Meakim (1892) 133 N. Y. 214.

[1]Hale, De Jure Maris, ch. 4; Moore, Foreshore and Seashore (3rd ed) 671 *et seq.*

[2]Royal Fishery of the Banne (1610) Davies 149; Bulstrode *v.* Hall (1663) 1 Sid. 148, 149; Shively *v.* Bowlby (1893) 152 U. S. 1; 1 Farnham, Waters & Water Rights 247 *et seq.*